No. 17781

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ISADORE SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from an order of the United States District Court for the Southern District of California, Southern Division, dated January 22, 1960, finding Appellant mentally competent to understand the proceedings against him at his previous trial in 1956 and to properly assist in his own defense at that time.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. Appellant's petition to vacate the judgment of conviction following his trial in 1956 was made under Section 2255, Title 28, United States Code. This Court has jurisdiction to entertain this appeal and review the order under Sections 1291 and 1294 of Title 28, United States Code.

II.

Statement of the Case.

On July 12, 1956, Appellant was found guilty in the United States District Court, Southern District of California, Southern Division, on all counts of an indictment charging violations of Title 18, United States Code, Section 545 and Title 26, United States Code, Section 4755. On July 26, 1956, the Honorable James M. Carter, District Judge before whom the case was tried, sentenced Appellant to a term of five years on Count One of the indictment and imposed a fine of $5,000.00. On Count Two of the indictment Appellant was sentenced to a term of five years to run consecutively to the sentence on Count One and fined $1.00. On Count Three of the indictment Appellant was sentenced to a term of five years and fined $1.00, said five year term to run concurrently with the sentence imposed on Count Two. On September 4, 1956, the judgment was modified in that the execution of sentence on Count Three only was suspended and the defendant was placed on probation for a period of five years to commence upon completion of the sentence imposed on Counts 1 and 2. This modification was later set aside on November 19, 1959. [R. T. 34-38].*

On October 7, 1957, Appellant filed a motion to set aside and vacate the sentence under Section 2255, Title 28, on the ground that he was insane at the time of arraignment, trial and sentence. On October 25, 1957,

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*R. T. refers to Reporter's Transcript of Proceedings.

an order was made by the District Court denying the motion to vacate sentence. A notice of appeal from this decision was filed by Appellant on November 26, 1957, and on January 20, 1958, this Court allowed Appellant to proceed *in forma pauperis.*

The order of October 25, 1957, was considered by this Court on March 10, 1959, in case No. 15908, Smith v. United States, 267 F. 2d 210, which held that Appellant was entitled to a hearing on his allegation that he was insane at the time of arraignment, trial and sentence. The District Court, after appointing two psychiatrists, held such a hearing on November 19, 20 and December 3, 1959, which was attended by Appellant and his two appointed counsel. Following the hearing at which extensive medical testimony was given by a psychiatrist of Appellant's own choice [R. T. 15], the District Court rendered its judgment (attached hereto as Appendix A), dated January 22, 1960, denying the motion to vacate the judgment in case 26007-Cr., Southern Division. Appellant filed a notice of appeal from this judgment on March 24, 1960, which this court considered by its order signed February 28, 1962, as having been timely filed. Appellant filed a brief dated August 27, 1962.

III.

Question Presented.

This Court in its order of February 28, 1962, has specified the sole issue on appeal as follows:

> ". . . whether there was substantial evidence before the court to support the trial court's findings that at the time of the prior criminal proceedings against the petitioner, by which he was convicted, he was mentally competent to understand the proceedings against him and to properly assist in his own defense."

IV.

Statement of Facts.

Appellant's Case:

Appellant testified that he was discharged from the United States Navy about 1945 for a mental disorder. He worked for a transit company, operating a street car in Los Angeles, California, from about 1945 until the latter part of 1948. He testified that during this period he experienced a constantly grinding type of noise which annoyed him, followed by a set of voices which grew progressively worse around 1948. He said he had suffered a mental black out and had an accident while operating a street car and thereafter resigned from the transit company. [R. T. 91-97].

Smith testified that the condition grew worse until he believed he was being followed and that his or his wife's life would be taken. After leaving the traffic company he went to barber school about 1948 and com-

menced working as a barber around 1949 or 1950, later owning his own barber shop about 1953. During the period between 1951 until 1956 he stated he had to quit work at times due to his ailment but during this period when he did work he worked as a barber. [R. T. 103-106].

Appellant testified further he still had the same condition in 1956 "that my life would be taken and there was a leader of a mob and I was supposed to follow the command." He stated that the condition had gotten worse to the extent "that the contour of people's faces were changing to the image of a hard mobster, and when fear would flare in me that it wouldn't be long before my life would be taken." [R. T. 107-108]. He testified this happened at the time "that I was approached to go to Tijuana, Mexico by Royal Lishey." [R. T. 108]. He stated he told Lishey that he wasn't up to going to Tijuana, but when Cain, who with Lishey was a codefendant in the original criminal case, came into the barber shop, Cain's image changed to a mobster and Smith determined he had better do what the "guy" wanted him to do. [R. T. 110]. He testified that he proceeded to go down to Tijuana with Lishey and Simmons, and Cain and Iles went in their car. [R. T. 111]. At this time he stated he felt this whole group were a part of a gang out to get him and if he didn't comply with anything asked of him, his wife and Simmons, who was a juvenile, would be killed. [R. T. 108, 120]. He didn't tell his attorney about these

images because "I figured Mr. Curzon and Mrs. Smith both were trying to have me locked up in a mental hospital." [R. T. 120].

He testified further that at different times the faces of the United States Attorney, the United States Marshal and a witness named Peet, respectively, turned into that of a mobster out to get him [R. T. 118, 119], but he didn't tell Mr. Curzon about this because he had a fear that Curzon and his wife were going to have him locked up. [R. T. 124].

On cross-examination he stated with respect to an examination, Exhibit 12A, given him on February 27, 1956, in which it was found by a Veteran's Administration board of two neuropsychiatrists that he was sane and competent, that he did not give considerable background as to disabilities because he did not trust them. [R. T. 138].

The testimony of both Lishey and Cain that it was Smith who asked them to go to Tijuana was called to Smith's attention and he claimed that Cain and Lishey conspired against him. [R. T. 139, 140]. He did not recall the testimony of a third witness, Iles, at the trial to the effect that Smith also asked Iles to go to Mexico. [R. T. 140]. He admitted having given information to the Veterans Administration doctors concerning his mental conditions at the various times, including the examination on February 27, 1956, but stated there were some things he hadn't told them. [R. T. 137, 138-143].

On redirect examination he stated he believed he had a 50 to 80 per cent disability rating by the Veterans Administration at the time of his arrest in 1956.

Mrs. Willie M. Smith, the wife of Isadore Smith testified that she found that his behavior was peculiar at the time he came out of the service in 1945. [R. T. 147, 148].

Mrs. Smith stated that during a period in 1945 her husband had threatened to commit suicide; that thereafter following his discharge from the Navy he had blackouts and nightmares; that he would disappear from his home and not come home for three or four days at a time; that he would tell her fantastic stories, and that this continued up until the trial. [R. T. 146-152]. She said appellant did not tell her about looking into faces and seeing a mobster's face "after he decided his attorney and I were . . . conspiring to send him to a mental hospital." [R. T. 153]. Mrs. Smith testified further that during the trial her husband pointed out a man as following them and that he wouldn't stay in San Diego but returned at night to Los Angeles to sleep during the trial. [R. T. 155-157]. During this entire period until 1956 she often went with appellant to the Veterans Administration where he received out-patient treatment. [R. T. 160].

Appellee's Case:

Harry D. Steward, who represented the United States as Assistant United States Attorney during the criminal proceedings in the case of United States v. Isa-

dore Smith, No. 26007-SD, in 1956, testified that he observed Smith on the stand at said trial and the various stages of said proceedings and in his opinion appellant was mentally competent to understand the proceedings against him and to properly assist in his own defense. At no time during said trial proceedings did Steward cause in behalf of the United States Attorney a motion to be filed for a judicial determination of the mental competency of appellant under Section 4244, Title 18, United States Code. [R. T. 48-53].

Myron Curzon, the attorney representing appellant during said criminal proceedings, testified (after appellant waived the attorney-client privilege) that he was aware of the mental background of Smith, that Smith cooperated with him and assisted in the defense of the charge and that the mental condition of appellant was not such as to warrant raising the issue of mental incompetency of Smith as a defense to the charge or as a basis for an application for a judicial determination of the mental competency of Smith under Section 4244, Title 18, United States Code. [R. T. 53-65].

On cross-examination Curzon testified that Smith was quite competent in everything he said or did except that he did not know whether a statement Smith had made on the witness stand was irrational or another lie which was not a "smart" lie when Smith testified that he had never seen a Government witness, Peet, before the trial and added that the witness had been following him around during the trial. [R. T. 67, 68].

Mrs. Eleanor Saggesse, San Diego County Deputy Sheriff, produced official records of the San Diego County Jail reflecting that Smith was examined by a physician when received there on June 4, 1956, and that during the criminal proceedings in 1956, certain medical treatment was prescribed for Smith on July 12, 15, 16, 18, 27; August 1, 6, 11, 25; September 12, 1956, but at no time during aforesaid period was any psychiatric or mental examination prescribed. [R. T. 76-87; Ex. 13, 14].

Court's Witnesses:

Dr. John D. Robuck, a physician duly qualified by education and experience to determine appellant's mental competency, reviewed all the exhibits including appellant's Veterans Administration file, C-5-169-892 [Exs. 1 and 12], and the Federal Institutions' medical reports [Ex. 2, 3, 4, 7, 8, 9, 10, 11], reviewed the testimony including that of appellant in the criminal proceedings in 1956, was present in court and heard all of the testimony at this Section 2255 hearing, observed Smith during said hearing and at a prior examination on July 8, 1959. Dr. Robuck testified that the petitioner had been mentally ill during the period of time referred to in 1956, but not sufficiently so to prevent his understanding the nature of the offense and to prevent his proper cooperation with counsel. Dr. Robuck placed the illness of defendant in the category of a schizophrenic reaction, paranoid type, with a qualification that said period in 1956 was a period of remission.

Pertinent parts of Dr. Robuck's testimony are attached hereto as Appendix B.

Dr. M. Brent Campbell, a physician duly qualified by education and experience to determine appellant's mental competency, and appointed as an additional Court witness also examined appellant in the presence of Dr. John D. Robuck on July 8, 1959. Both Dr. Campbell and Dr. Robuck found by written reports to the Court, filed herein as Exhibits 5 and 6, respectively, that appellant was mentally competent to understand said Section 2255 proceedings and to properly assist in prosecuting the same.

V.

Argument.

The burden of proof in a Section 2255, Title 28, proceeding is upon the petitioner. *United States v. Trumblay* (7th Cir., 1956), 234 F. 2d 273, 274, cert. den. 352 U. S. 931. The cases also hold that on direct appeals a conviction should be sustained if there is substantial evidence, taking the view most favorable to the Government to support it; and in considering the facts, the reviewing court must grant every reasonable intendment in favor of appellee. *United States v. Glasser,* 315 U. S. 60, 80 (1942). *Arena v. United States,* 225 F. 2d 227, 229 (9th Cir., 1956), cert. den. 350 U. S. 954 (1956).

In any event, the appellee contends the evidence adduced at the within hearing under Section 2255 amply supports the trial court finding that the appellant was

mentally competent to understand the charges of illegally importing and concealing marihuana and to properly assist in his own defense. Dr. Robuck's testimony to that effect is not disputed by any competent medical testimony. Before arriving at this conclusion Dr. Robuck had personally examined appellant on one previous occasion; and had before him the entire medical record of the Veterans Administration concerning Smith as well as the finding of the Director of Prisons [Ex. 7], to the effect that there was no cause for making a certificate under Section 4245 of Title 18 that there was a possible undisclosed incompetency existing in this case during trial.

Dr. Robuck also heard all the testimony presented on both sides during the Section 2255 proceeding as well as observing appellant and hearing his testimony. In addition to examining all of the pertinent medical records regarding appellant, Dr. Robuck also reviewed the Reporter's Transcript [Ex. 15] of the trial which resulted in Smith's conviction in 1956.

A brief summary of the evidence at said trial reflects that Smith was one of five men, the others being, Lishey, Simmons, Iles, and Cain, who went to Tijuana [at the instance of Smith—pp. 85, 203, 456 of Exhibit 15; R. T. 139-148], in the early morning of April 26, 1956, in Smith's 1955 Chrysler and Iles' 1951 Plymouth. At Tijuana, Baja California, Mexico, three sacks containing about seven pounds of marihuana were obtained and placed in said Plymouth which was then driven into the United States later that day by Cain and Iles. Cain and

Iles testified that Smith while in Mexico transferred the bags of marihuana from his Chrysler to the Plymouth and that said Chrysler entered the United States from Mexico with Smith therein just before the Plymouth entered. [Pp. 105, 108, 221 of Ex. 15]. Appellant testified in defense that he had gone to Tijuana at the suggestion of Lishey with Lishey and Simmons in his Chrysler on April 26, but that at no time during this trip had he seen the 1951 Plymouth in which Iles and Cain were riding. [Pp. 336, 345 of Ex. 15].

In rebuttal the Government impeached Smith by a disinterested service station attendant named Gilbert Peet, who placed Smith at a Standard station in Del Mar, California, in his Chrysler together with the 1951 Plymouth, where Smith paid for gas which was placed in said Plymouth, at a much earlier time than Smith claimed he had passed through that area. [Pp. 421, 489-504 of Ex. 15]. Appellant in surrebuttal denied that he had ever seen this witness before the trial adding that the witness had been following him around for two or three days, a fact which has been emphasized by appellant as demonstrating his irrationality.

The denial by appellant that he had never seen Peet before the trial was a falsehood according to Peet's testimony. The verdict of the jury also found false Smith's denial that he had not seen the 1951 Plymouth in Tijuana. Peet's testimony rendered Smith's falsehoods much less effective than they heretofore had been against the accomplice testimony of Cain and Iles. Appellant's defense counsel himself to counter Peet's testi-

mony had immediately before Smith's surrebuttal testimony attempted to discredit Peet by referring to seeing Peet in the elevator the night before his testimony and attempting to show that Peet had received a "deal" from the government. [Pp. 500-506 of Ex. 15.] The fact that appellant added what may be fairly characterized as not a "smart lie" from the defense standpoint in an attempt to further discredit Peet, or for some other purpose, cannot properly be construed as disestablishing the clear testimony by appellant to questions directed to him throughout the trial.

Assuming *arguendo* a single irrational statement by appellant during his entire testimony, this of course does not of itself establish a lack of understanding of the type which prevented appellant from appreciating the nature of the proceedings and rendered him unable to aid properly in his defense thereof. As stated in *Smith v. United States, supra,* at page 211 the existence of some form of insanity by medical tests is not sufficient.

This court in the case of *Isadore Smith v. United States, supra,* at pages 210, 211 stated further:

> "Here defendant Smith did not urge insanity as a defense to the crime. Inasmuch as he was convicted of offenses relating to narcotics, the reason for this is not far removed. It strikes the casual observer that trafficking in marijuana is hardly the occupation that most insane persons are impelled to engage in by virtue of their disability. Of course, it might be possible in an isolated instance."

The evidence in this case demonstrates that here, however, was not such an isolated incident. The trip itself

to Mexico for marijuana was so well planned and executed by Smith, a prime offender that he passed through the port of entry without detection. Furthermore, to paraphrase Dr. Robuck at [R. T. 208], if appellant had been ill to the degree that he described himself as being in his testimony he could not have "put together or maintained as coherent and well-constructed a story as he presented in his original testimony." The appellant having failed in a well thought out and ingeniously contrived defense to the original charge, has not shown that he is entitled to a "second bite at the apple." On the contrary, appellee United States has presented substantial evidence supporting the trial court's finding that appellant was mentally competent to understand the proceedings and to assist in his defense of the offense in 1956.

VI.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the District Court's ruling denying appellant's motion after a full hearing was entirely correct on the basis of the evidence in this cause.

Wherefore, appellee respectfully prays that the appeal be denied.

Respectfully submitted,

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United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

ELMER ENSTROM, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United State of America.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Ruled 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANCES C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant United States Attorney,
Chief, Criminal Section,

ELMER ENSTROM, JR.,
Assistant United States Attorney,

Attorneys for Appellee,
United States of America.

APPENDIX A.

Findings of Fact, Conclusions of Law and Judgment.

In the United States District Court, in and for the Southern District of California, Southern Division.

Isadore Smith, Petitioner, vs. United States of America, Respondent.

The above matter came on for trial on November 19, 20 and December 3, 1959, before the Honorable James M. Carter, United States District Judge. The Petitioner appeared in person and by his appointed counsel, Robert Ward, Esquire, and Max Lercher, Esquire, and the Respondent appeared by counsel, Laughlin E. Waters, United States Attorney, Robert John Jensen, Assistant United States Attorney, Chief, Criminal Division, and Elmer Enstrom, Jr., Assistant United States Attorney, and evidence both oral and documentary was introduced on behalf of both parties and the Court having fully considered the same and heard the arguments of counsel and being fully advised, makes the following findings:

I

That the Petitioner is in custody of the Attorney General by reason of his conviction in this Court of the offenses of illegal importation and concealment of marihuana, in violation of United States Code, Title 18, Section 545 and importation of marihuana without payment of tax, in violation of United States Code, Title 26, Section 4755 as charged in three counts of Indictment No. 26007 Cr., Southern Division, wherein he was sentenced on July 26, 1956, to imprisonment for a period of five years and fined $5,000.00 on Count

One, and five years and a fine of $1.00 on Count Two to run consecutively to sentence on Count One, and five years and a fine of $1.00 on Count Three, sentence as to imprisonment on Count Three to run concurrently with sentence on Count Two.

II

This is a proceeding by Petitioner under United States Code, Title 28, Section 2255, to vacate the foregoing judgment and this Court has jurisdiction thereof by virtue of said section; and the issue raised thereby as determined by the pretrial stipulation and order is as follows:

Whether at the time of the prior aforesaid criminal trial proceedings, including arraignment dated June 4, 1956, trial dated July 10, 11, 12, 1956, and sentence July 26, 1956, Smith was mentally competent to understand and the proceedings against him and properly assist in his own defense.

III

That the Petitioner was represented at all times during the foregoing criminal proceedings by his counsel, Myron W. Curzon, who has testified at this hearing that he was aware of the mental background of Petitioner, that Petitioner cooperated with him and assisted in the defense of the charge, and that the mental condition of Petitioner was not such as to warrant raising the issue of mental incompetency of Petitioner as a defense to the charge or as a basis for an application for a judicial determination of the mental competency of Petitioner under United States Code, Title 18, Section 4244; and the Court finds that Petitioner was effectively represented in said criminal proceedings and that the issue of the mental incompetency

of Petitioner was not raised as a defense or as a basis for an application under aforesaid Section 4244, United States Code, Title 18, in said criminal proceedings.

IV

That the respondent was represented by Harry D. Steward, Assistant United States Attorney, during the foregoing criminal proceedings and he has testified herein that he observed Petitioner on the stand at the trial and the various stages of the said proceedings and that in his opinion Petitioner was mentally competent to understand the proceedings against him and to properly assist in his own defense and the Court finds that at no time during aforesaid proceedings did the United States Attorney file a motion for a judicial determination of the mental competency of Petitioner under United States Code, Title 18, Section 4244 in said prior criminal proceedings.

V

That the Acting Director of the Bureau of Prisons has testified by affidavit that the Director of the Bureau of Prisons did not find probable cause to believe that Petitioner was mentally incompetent at the time of his trial and, therefore, had no basis to make a certification under United States Code, Title 18, Section 4245 to the effect that there was probable cause to believe that Petitioner was mentally incompetent at the time of his trial and the Court finds that such a certificate was not made.

VI

That the Petitioner was examined by a physician of the San Diego County Jail when received there on June 4, 1956, and during said prior criminal proceedings

that certain medical treatment for Petitioner was prescribed on the following dates: July 12, 15, 16, 18, 27; August 1, 6, 11, 25; September 12, 1956, but at no time during aforesaid period was any psychiatric or mental examination prescribed.

VII

That there have been received in evidence all available medical reports concerning Petitioner, including his Veterans Administration file, C-5-169-892, and the Federal Institutions' medical reports and the testimony of Petitioner and his wife, Mrs. Willie Smith.

VIII

That Dr. John D. Robuck, physician duly qualified by education and experience to determine Petitioner's mental competency, was appointed herein as the Court's expert witness and has reviewed all exhibits including the foregoing medical records and the testimony, including that of Petitioner, at the prior criminal proceedings, and was present in Court and heard all of the testimony at this proceedings; observed Petitioner during this trial and at a prior examination on July 8, 1959, and testified, and the Court now so finds in accordance with his opinion, that the Petitioner has been mentally ill during the period of time referred to in 1956, but not sufficiently so to prevent his understanding the nature of the offense and to prevent his proper cooperation with counsel. That his illness would be placed in the category of a schizophrenic reaction, paranoid type, with a qualification that the period in 1956 was a period of remission.

IX

That Dr. M. Brent Campbell, a physician duly qualified by education to determine Petitioner's mental

competency, was appointed as an expert witness and also examined Petitioner in the presence of Dr. John D. Robuck on July 8, 1959, and both he and Dr. Robuck found by written report to the Court, and filed herein, that at that time Petitioner was mentally competent to understand the instant proceedings and to properly assist in prosecuting the same; and the Court further finds in accordance with said opinions and the opinion of Dr. Robuck at this trial on November 19, 20 and December 3, 1959, the Petitioner was mentally competent to understand said trial proceedings and properly assist in prosecuting the same; that Petitioner though suffering from mental illness, is presently legally sane.

WHEREFORE, THIS COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

I

That at the time of the prior criminal trial proceedings, including arraignment dated June 4, 1956, trial dated July 10, 11, 12, 1956, and sentence July 26, 1956, and at this trial on November 19, 20 and December 3, 1959, Petitioner was mentally competent to understand the proceedings against him and properly assist in his own defense. That presently the Petitioner, though mentally ill, is legally sane.

II

That the motion of Petitioner to vacate the judgment and sentence dated July 26, 1956, in said prior criminal trial proceeding, No. 26007-Cr should be denied.

The Court recommends that Petitioner be immediately paroled and given treatment by the Veterans Administration as an "in" or "out" patient.

Judgment.

IT IS THE JUDGMENT OF THIS COURT that the motion of Petitioner, Isadore Smith, to vacate the judgment, sentence and commitment in case No. 26007-Cr. be, and the same is, hereby denied.

Dated: January 22, 1960.

JAMES M. CARTER,

United States District Judge.

APPENDIX B.

The following excerpts are taken from the Reporter's Transcript of Dr. Robuck's testimony, November 20, 1959, at the following pages:

Examination by Judge Carter at pages 166 to 174, inclusive:

Q. You examined Isadore Smith for the first time when, if you recall? A. As I recall the date, it was July 8, 1959.

Q. Have you examined him on any other occasion since that time? A. Not directly; only by observation in the courtroom yesterday.

Q. You heard all the proceedings in court yesterday. A. Yes, sir, I did.

Q. And you inspected the file of the Veterans Administration? A. Yes, sir.

Q. Which is Exhibit 12, including the parts selected by Counsel which were marked Exhibit 12-A and Exhibit 12-B? A. Yes, sir.

Q. Did you inspect the file in the criminal case in which he had been convicted in 1956? A. Yes, sir.

Q. Did you read all or part of the transcript of that trial? A. I did.

Q. What did you read? A. As far as I can recall, I read practically all of it.

Q. The testimony? A. Yes, sir.

Q. And you read all of the testimony of the petitioner Smith? A. Yes, I did.

Q. That prior trial started with an arrest on June 2, there was an arraignment in court on June 4, 1956,

the defendant was tried on July 10, 11 and 12, 1956, and he was sentenced on July 26, 1956, as I recall the dates.

Do you now have an opinion as to whether or not, during that period of time from June 2, 1956, the date of arrest, to July 26, 1956, the petitioner Isadore Smith was mentally competent to understand the proceedings against him and properly to assist in his own defense? Do you have such opinion? A. Yes, sir.

Mr. Enstrom: If your Honor please, would you add—I think the Doctor has in mind the charge of illegally bringing marijuana into the United States.

The Court: Yes, I will add to the question: Having in mind the charge in the prior criminal case, one Court of which was importing marijuana, on which he was sentenced, and the second Count of which was illegally facilitating, transporting and concealing of marijuana after importation, do you now have an opinion as to whether or not the petitioner Isadore Smith was mentally competent to understand the proceedings against him and properly to assist in his own defense and cooperate with counsel? Answer yes or no.

The Witness: Yes, sir, I do.

The Court: What is your opinion? And what are your reasons therefor?

The Witness: It was my opinion that he was able to understand the nature of the proceedings against him at that time and to participate in his own defense. And if I may, I have jotted down some of the points that, it seemed to me, had a bearing on this. I would like to mention those. I will try to place these, to some degree, in chronologic order in order that they may present a coherent picture.

First, Mr. Smith's behavior immediately prior to the trial and prior to the commission of his act apparently had been reasonably satisfactory to the people who shared the community with him. As I recall from the trial testimony, there was evidence to the effect that he was a person who was easy to meet, who was apparently well accepted and well liked by the individuals who so testified.

Second, he has been examined, not very many months previous, by the Veterans Administration's physicians, and it was thought at that time, according to their report, that his evidence of mental illness was apparently no greater than it had been over the previous few months or previous year or two.

I will point out here that, apparently, some five years before he had been considered quite ill, and I think had his condition worsened from the state described, I believe, by Dr. Clark in late 1951, he would undoubtedly have deteriorated in his behavior to the point that he would have been confined to a hospital. This did not happen. He managed, instead, to establish himself in a business and to function at least to the degree of making a living in that business.

In the multiple examinations and inquiries that had been made of him there is little, if any record of the history of these delusions and hallucinatory experiences which he described to us yesterday. This, I think, in my experience would not be consistent with the behavior of a person who was plagued by delusions or hallucinations, because in general these thoughts and ideas cannot be contained and are usually reacted to or are expressed to other people, particularly when other people ask directly about them. Lay people very often

are quite well aware of an abnormality of this kind in an individual troubled to the degree that Mr. Smith indicated that he felt that he was. He stated repeatedly that he had feared that his wife would be killed as a part of this plot against him, and yet at the same time he indicated that there were also feelings on his part that she was a part of the plot. This is inconsistent, in my experience, with a delusional thinking, in which a person is seldom assigned a dual role by their being a part of the plot and victim of the plot. Consequently, I don't think this was a likely situation.

In my interview with Mr. Smith on July 8 of this year, he informed me that he was angry at his attorney and did not have trust in his attorney and offered at that time that the reason that this occurred was that his attorney would not raise the question of his health. Later in the same interview he told me that he had some fear of being locked up as being insane. I did not catch this inconsistency at the time. But perhaps this can be developed later.

In the evidence as related in the transcript and in the testimony yesterday, Mr. Smith's attorney at the time of the trial did apparently not make any claim that Mr. Smith could not assist in his own defense and proceeded with his responsibility as Mr. Smith's attorney without dissatisfaction with Mr. Smith's ability to particpate wth him. Further, Mr. Smith, I think, seemed to demonstrate that his mental health was such that he could assist in his own defense, as indicated in the testimony in regard to bringing one of the witnesses to the attorney's home to make a statement regarding the case, which would have been in Mr. Smith's defense.

The question of Mr. Smith's mental state, as far as its being a defense for his behavior, was not raised by his attorney, and he indicated yesterday that apparently it was not a serious enough question that he felt it was something that should be raised.

As I read the description of Mr. Smith's behavior during the trial, as exhibited by the reactions of other people to him, and the comments that he made in direct testimony, his behavior and comments did not seem to raise the question of his mental health in the mind of any of the viewers, with the possible exception of the one statement that was discussed yesterday where he commented about Mr. Peet following him around. His account of himself as he described his behavior in the course of his testimony presented a fairly consistent, well-knit picture which, I think, would not have been the production of a person who was as mentally disturbed as Mr. Smith indicated to us that he felt he was at that time.

I think the incident in which Mr. Smith described seeing the vision of Mr. Peet—and I think he referred to that as the "image" of Mr. Peet, his face—in Mr. Smith's testimony yesterday, was the only time that he mentioned his delusions or hallucinations to any other person. This apparently was in the courtroom, and was to his wife, when he indicated that Mr. Peet was present in the restaurant with him at lunch that day. And this was near the end of his trial. This, in my mind, could have been either a deliberately false statement laying the foundation for this appeal, or it may have been a transient break with reality which was unlike his apparent condition during the remainder of the proceedings that were described in the transcript.

Mr. Smith did not claim to anyone, apparently, that he had been convicted while mentally ill until somewhat after the acute episode of mental illness which occurred after he had been imprisoned. I did not understand this delay. He indicated that he wanted to relate this to the Judge—I think this was immediately prior to sentencing—but that he did not have this opportunity. I do not know why he did not relate this to another person who, he felt, would inform the Judge, or why he did not write a letter directly to the Judge, since he had written other letters to the Judge and had evidence that those had been delivered and examined.

I think that had he been delusional and hallucinated during his trial, and if his account of his behavior had been based on his delusional or hallucinated state, it would seem unlikely to me that a person with this degree of mental illness would then abandon this account, as Mr. Smith is said to have done, and to have said that it was a lie. I think in order for the story to have been presented as it was, and to have it accepted as an extension of his mental illness or a projection of his mental illness, that we would have to say that it would probably not be abandoned abruptly when it had apparently served its purpose.

The somewhat broader view of the testimony I am giving, then. I think his history has indicated that Mr. Smith has been chronically ill mentally for many years. I think he was especially ill in 1951, as indicated by the Veterans Administration records, and certainly again in 1956 and part of 1957 when he was hospitalized after his sentence.

The description of Mr. Smith—his activities, his social behavior, the medical examinations prior to the

act, etc.—did not suggest to me that he was particularly disturbed mentally at the time of the act or at the time of his trial, and on this basis I rest my opinion that he was able to understand the nature of the proceedings against him and that he was able to participate in his own defense.

The Court: I have just one question, and then you may examine.

In other words, our inquiry here is whether or not Mr. Smith was competent to understand the nature of the proceedings and to cooperate with his Counsel during this period in 1956.

You are of the opinion that he was mentally ill for some period of time. Would you also say he was mentally ill during that period in 1956, but not sufficiently to prevent his understanding the nature of the offense and his cooperation with Counsel?

The Witness: Yes sir.

The Court: If this were an inquiry, as it were, whether this man was mentally ill period, your answer would be Yes?

The Witness: Yes, sir, it would.

The Court: If the inquiry is, Was he able to understand the nature of the proceedings and to cooperate with Counsel, your answer to that is also Yes?

The Witness: Yes, sir.

Examination by Judge Carter at pages 194, 195:

The Court: Doctor, when I asked you your opinion I did not incorporate the words "with reasonable medical certainty." Are the opinions you have given here those based upon an inclusion of that phrase "reasonable medical certainty"?

The Court: Now, you say that Mr. Smith was ill in 1956 and is ill today, but that in your opinion both at the time concerned in 1956 and in July of this year he has been able to cooperate with Counsel and to understand the nature of the proceedings involved. Tell us in layman's language what is wrong with Mr. Smith now, and what was probably wrong with him in 1956.

The Witness: Well, I think we would see such things as a tendency to be more suspicious of other people and their motivations than would occur in the average person. There would be a tendency to be over-concerned about detailed matters, that is, almost to the point of losing track of the thread of the conversation or the thread of an idea as he pursued some of the side issues. I think we would see what we would call a blunting of affect, by which we mean that the person doesn't show much emotional response to situations in which some would be expected, and that sometimes when the emotional response does come it is not quite what would be expected, either in quantity or in quality. These are the chief things that we would note.

The Court: Is there a term that you would apply to his condition when you say he is presently ill?

The Witness: Yes, sir. I would think that, were I diagnosing this, I would place it in the category of a schizophrenic reaction, paranoid type, with the qualification in remission.